IN THE SUPREME COURT OF FIJI
CRIMINAL APPELLATE JURISDICTION

CRIMINAL PETITION CAV 0010 OF 2017
(On appeal from the Court of Appeal AAU 16 of 2013)

BETWEEN: **ROHIT RANJIT KUMAR**

Petitioner

AND: **THE STATE**

Respondent

Coram: **The Hon. Chief Justice Anthony Gates, President of the Supreme Court**
The Hon Mr Justice Keith, Judge of the Supreme Court
The Hon Mr Justice Calanchini, Judge of the Supreme Court

Counsel: **Mr M Yunus for the Petitioner**
Mr S Vodokisolomone for the Respondent

Date of Hearing: **13 October 2017**

Date of Judgment: **26 October 2017**

JUDGMENT

Gates P

[1] I concur with the reasoning and conclusions in the judgment of Calanchini J.

Keith J

[2] I agree that leave to appeal should be refused for the reasons given by Calanchini J whose judgment I have read in draft. I add a few observations of my own about the approach of the trial judge and the Court of Appeal to the issue about the complainant's previous offending.

[3] If the court record is anything to go by, the judge was being given contradictory information about when the complainant's previous court appearance had been disclosed to the defence. The court record says that counsel for the petitioner told the judge: *"If the Accused had that information of the dishonesty could have raised with the victim regarding her credibility."* In other words, the judge was being told by the defence that the information had not been given to the defence by the time the complainant had completed her evidence. On the other hand, the court record says that counsel for the prosecution told the judge: *"I am objecting to recall. When she gave evidence nothing put to her. That would have been clear at that stage."* In other words, the judge was being told by the prosecution that the information had been given to the defence by the time the complainant was giving evidence. The judge appears not to have picked up this difference. The court record says nothing about the judge pointing out this difference to counsel, and he did not refer to it in his ruling. As it is, we know now that what counsel for the prosecution told the judge was incorrect: the prosecution agrees that this information was only given to the defence after closing submissions and just before the judge's summing-up.

[4] It is therefore highly possible that the judge had not taken on board what counsel for the petitioner had told him, and acted on what he had been told by counsel for the prosecution. That could explain why he thought that the requirements of section 116 of the Criminal Procedure Act had not been satisfied, although it would have been better if he had said why he had reached that conclusion. Indeed, we do not know whether he

even considered whether permitting the complainant to be recalled so that her previous offending could be put to her was *"essential to the just decision of the case"*.

[5] Since on this footing the exercise of the judge's discretion would have been flawed - either because he proceeded on an erroneous view of the true facts or because he did not consider whether permitting the complainant to be recalled was essential to the just decision of the case - it was necessary for the Court of Appeal to consider the exercise of that discretion afresh. The Court of Appeal did not do so because it thought that the exercise of the judge's discretion had not been flawed: see para 30 of its judgment. However, the Court of Appeal went on to consider whether the judge's ruling might have resulted in a miscarriage of justice. For the reasons given both by the Court of Appeal and Calanchini J, I do not think that there is a risk that a miscarriage of justice might have taken place. The nature of the complainant's previous offending and her age at the time could not, in my view, have cast any real light on whether she was lying over what she alleged the petitioner had done to her. In short, had the assessors and the trial judge known about the complainant's previous offending (such as it was), the assessors would still have expressed the opinion that the petitioner was guilty, and the judge would still have found him guilty. In the circumstances, this was a classic case for the application of the proviso to section 23(1) of the Court of Appeal Act.

[6] It is, of course, not possible for the prosecution to disclose what it does not know, and it is not disputed that the prosecution was unaware of the complainant's previous offending until just before it was disclosed to the defence. But it may be that the prosecution's duty of disclosure relates, not just to information it has, but also to information which it could reasonably have been expected to obtain. Although we can make an educated guess about how it came about that the prosecution did not have this information before it did, the fact is that we do not know that for sure and we cannot speculate about that. But if it had turned out that this was information which the prosecution could reasonably have been expected to obtain, that would not, in my opinion, have affected the outcome of this application for leave to appeal. It is true that the petitioner would not have had to rely on section 116 as the gateway to putting the complainant's previous offending to her. If it

had been disclosed to the petitioner when on this hypothesis it should have been, the complainant could have been cross-examined about it in the course of the trial. The question would then have been whether denying the petitioner that opportunity could be said to have denied him a fair trial. I do not think that it would have done - for the same reason that there is no risk that a miscarriage of justice might have taken place as a result of the judge's ruling on the application under section 116: the petitioner would have been convicted anyway.

Calanchini J

[7] At a trial in the High Court before a Judge sitting with three assessors Rohit Ranjit Kumar (the petitioner) appeared on one count of rape contrary to section 207(1) and (2)(a) of the Crimes Act 2009. The three assessors returned unanimous opinions of guilty and the learned trial Judge in a brief judgment dated 15 March 2013 agreed with the opinions of the assessors and convicted the petitioner. On 27 March 2013 the petitioner was sentenced to 16 years imprisonment with a non-parole term of 15 years.

[8] The petitioner appealed to the Court of Appeal against his conviction on 13 grounds and against sentence on three grounds. At the hearing of the leave application the petitioner abandoned his appeal against sentence. The petitioner was granted leave to appeal against conviction on three grounds that related to section 116 of the Criminal Procedure Act 2009 (the Act) and the non-disclosure of what has been described as a previous conviction of the complainant. Leave was refused on the remaining ten grounds and the application for leave on those grounds was not renewed before the Court of Appeal. The Court of Appeal dismissed the petitioner's appeal in a written judgment delivered on 26 May 2017.

[9] The background proceedings may be stated briefly. The petitioner was tried in the High Court on an amended information filed on 15 June 2012 by the Director of Public Prosecutions on one count of rape the particulars of which were that the petitioner *"between the 1st and the 31st March 2011 at Yalalevu (in Ba) penetrated the vagina of*

(the complainant) without her consent." The agreed facts dated 18 April 2012 stated that (1) as at that date the complainant was aged 17 years and unemployed and (2) the complainant and the petitioner knew each other as they attended the same church. It was not disputed that the petitioner was born on 18 May 1971. At the time of the offence he was 39 years old and the pastor of her church. The complainant was born on 15 May 1994 and at the time of the offence in March 2011 was 16 years old.

[10] For the purposes of this petition the case against the petitioner may be summarised as follows. On a date in March 2011 the petitioner visited the complainant whilst she was alone at home. The petitioner had given the complainant a new mobile phone a few days earlier and had been sending her "*text*" messages to which she had not replied. The petitioner took her to her father's bedroom, undressed her and had sex with her. She did not consent and was crying and attempting to stop him. For some time she did not tell anyone about the incident. She said she was scared. The petitioner continued to send text messages. The complainant later gave the mobile phone to her father who apparently approached the petitioner to find out what was going on. On 20 May 2011 the complainant made a statement to the police and consented to a medical examination which took place on 26 May 2011. The medical evidence was to the effect that the history relayed to the doctor was consistent with his medical examination of her. He was not able to conclude that she had been raped or that she had been sexually abused.

[11] In his defence the petitioner called one witness and gave evidence himself. Somewhat surprisingly his witness gave evidence first. That evidence related to the allegation that the complainant's father had requested money from the petitioner to settle the matter.

[12] The petitioner's defence was that he did not have sexual intercourse with the complainant. He denied that the incident ever took place. He admitted to buying a $59.00 mobile phone for the complainant with money given to him by the complainant. He admitted to having visited the complainant's home for what he described as prayer sessions. He claimed that there were demands for money by the complainant's father to settle the matter.

[13] The evidence was completed on 13 March 2013. Counsel presented closing submissions on 14 March 2013. Summing up by the learned trial Judge was to have commenced on 15 March 2013 at 10.00am. However when the court resumed Counsel for the petitioner informed the Court that the complainant had been *"charged and convicted for using of stolen property on 13/06/12."* Counsel submitted that had that information concerning the dishonesty offence been available, the complainant could have been cross-examined with a view to shaking her credibility. Counsel relied on section 116 of the Act and requested the Court to order that the complainant be re-called for that purpose. The application was opposed by the State on the basis that the time for cross-examining was when the complainant was giving her evidence.

[14] In an ex tempore Ruling delivered on the same day the trial Judge recounted the history of the prosecution and events leading up to the trial in the High Court. After reciting section 116 of the Act the learned Judge concluded:

> *"Considering the application of the defence Counsel in light of the law and the history of this case, I do not find that the defence application is qualified under section 116 of the Criminal Procedure Decree hence I reject the application."*

[15] It was against that Ruling that the petitioner was granted leave to appeal to the Court of Appeal against his conviction. Before turning to the Court of Appeal judgment it is now appropriate to set out section 116 of the Criminal Procedure Act which states:

> *"(1) At any stage of trial or other proceeding under this Act, any court may-*
>
> *(a) summon or call any person as a witness; or*
> *(b) examine any person in attendance though not summoned as a witness; or*
> *(c) recall and re-examine any person already examined -*
>
> *and the court shall summon and examine or recall and re-examine any such person if the evidence appears to the court to be essential to the just decision of the case.*

> *(2) The prosecution or the defence shall have the right to cross-examine any person giving evidence in accordance with sub-section (1), and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness."*

[16] The Court of Appeal considered first ground three relating to non-disclosure of the complainant's criminal history by the State which it was claimed resulted in the petitioner being denied a fair trial. They re-stated the long standing principle that it is the duty of the prosecution in a criminal trial to disclose to the defence any material in its possession that could affect the prosecution case or undermine the credibility of prosecution witnesses. The Court appeared to accept that the duty did not extend to the prosecution disclosing material that was not in its possession. The Court also noted that the prosecution had disclosed the material to the defence as soon as it had become aware of the material and this was shortly after closing addresses. The Court found that the prosecution had not purposefully withheld that information and concluded that the prosecution had complied with its duty to disclose. The Court dismissed ground three and in doing so must have been satisfied that the petitioner had received a fair trial.

[17] The Court of Appeal considered grounds one and two together on the basis that they related to the decision of the trial Judge to refuse the petitioner's application under section 116 of the Act. In paragraph 30 of the judgment the Court of Appeal concluded that because the Judge was satisfied that the application to recall the complainant did not qualify under section 116 of the Act he had correctly exercised his discretion. The Court rejected the contention that the learned Judge had considered the issue of delay in the course of his Ruling. However, it must be accepted that the trial Judge has not stated why the application to recall the complainant did not qualify under section 116. The only issue discussed by the trial Judge was the history of the proceedings in the High Court and the regular assurances by both parties that the matter was ready for trial. The trial Judge made no reference in his Ruling to whether the evidence of the complainant's prior criminal history was essential to the just decision of the case.

[18] However the Court of Appeal then proceeded to consider whether the Ruling had caused a substantial miscarriage of justice to the defence. It should be noted that this was most probably not the correct test to be applied by the Court of Appeal. Under section 23 of the Court of Appeal Act the Court may allow an appeal against conviction in the case of a miscarriage of justice unless it is satisfied that there has been no substantial miscarriage of justice. The Court of Appeal correctly, in my judgment, considered that the issue should be determined by considering the nature of the prior criminal history and its relevance to the matter presently before the court. Relying substantially on the decision of the New Zealand Court of Appeal in **R v G** (1992) 8 CRNZ 9 the Court concluded that the complainant's prior finding of guilt for receiving stolen property had no direct relevance to the veracity of the allegations of sexual violation by the petitioner who was well known to both the complainant and her family. The Court of Appeal found that there had been no substantial miscarriage of justice and dismissed both grounds one and two.

[19] In his petition to this Court, the petitioner seeks to re-argue the same grounds of appeal against conviction, namely:

> *"1. That the Appellate Court did not properly consider and/or evaluate the effects of the learned trial Judge's failure in refusing the Appellant's application under section 116 of the Criminal Procedure Act to recall the complainant for the purpose of re-examination of her previous conviction which was not disclosed to the defence but only found by the Appellant's counsel before the summing up by the learned trial Judge. The said refusal to recall the complainant caused a substantial miscarriage of justice.*
>
> *2. That the Appellate Court did not properly consider and/or evaluate the effects of the learned trial Judge disregarding the proposition of the law that was cited by the Appellant's counsel when the Appellant's counsel made application to recall the complainant under section 116 of the Criminal Procedure Act on the basis that the prosecution failed to disclose the previous conviction of the complainant who had given evidence and the Appellant's counsel had no opportunity to cross-examine her due to her non-disclosure of her previous conviction.*

3. *That the Appellate Court did not properly consider and/or evaluate that the effects of the prosecution's non-disclosure of the previous conviction of the complainant to the Appellant led to a denial of a fair trial and such allowed a substantive miscarriage of justice to occur."*

[20] The petitioner's complaint is that the failure by the trial Judge to allow the complainant to be recalled and to be cross-examined under section 116 of the Act and the failure of the prosecution to disclose the complainant's prior criminal history in a timely manner denied the petitioner the opportunity to cross-examine the complainant about her prior criminal history and thereby deprived the petitioner of a fair trial and resulted in a substantial and grave injustice.

[21] The circumstances under which this Court is permitted to grant leave to appeal to a petitioner in a criminal petition are set out in section 7(2) of the Supreme Court Act 1998 which provides that:

> *"In relation to a criminal matter the Supreme Court must not grant leave to appeal unless:*
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> *(a) a question of general legal importance is involved;*
> *(b) a substantial question of principle affecting the administration of criminal justice is involved; or*
> *(c) substantial and grave injustice may otherwise occur."*

[22] The criteria for granting leave under section 7(2) have been the subject of frequent comment by this Court over many years. In **Katonivualiku –v- The State** (CAV 1 of 1999; 17 April 2003) the Court observed that:

> *"It is plain from this provision that the Supreme Court is not a Court of Criminal Appeal or general review not is there an appeal to this Court as a matter of right and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal _ _ _."*

[23] The above passage has been cited with approval in subsequent decisions of the Court such as **Qurai –v- The State** (CAV 24 of 2014; 20 August 2015) and more recently in **Arora –v- The State** (CAV 33 of 2016; 6 October 2017). The parameters of section 7(2) are the concepts of *"general legal importance"*, *"substantial question of principle"* and *"substantial and grave injustice"* which reflect the principles formerly applied by the Privy Council as the final court of appeal in criminal appeals from the Court of Appeal: **Prasad –v- The Queen** (1982) 28 Fiji LR 154. It is apparent from these observations that the proceedings in this Court are not by way of re-hearing as is the case in the Court of Appeal. As a court of error this Court does not exercise the revising functions of a court of criminal appeal: **Ibrahim –v- R** [1914] AC 599 at 614. Although this is an application for leave to appeal the Court has consistently considered applications for leave to appeal and the hearing of the criminal appeal at the same time and as being upon the same footing. As Lord Sumner observed in **Ibrahim –v- R** (supra) at page 615:

> *"The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. _ _ _ There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law _ _ _."*

[24] In the present petition grounds one and two raise two issues. First, did the learned trial judge err when he refused the petitioner's application to recall the complainant? Secondly, did the decision to refuse the application result in a substantial and grave injustice? The starting point is to examine section 116(1) of the Act. The section commences by stating that any court may, at any stage of a trial, summon and examine any person as a witness whether summoned or not and may recall and re-examine any person already examined. Up to that point the court is given what is essentially an unfettered discretion. This discretion may be exercised by the court on its own motion or by application made by either the prosecution or the accused. The latter part of section 116(1) imposes an obligation on the court to act in accordance with the section if the evidence that is proposed to be adduced appears to the court to be essential to the just decision of the case. Thus section 116(1) provides that a court must summon and

examine or recall and re-examine any person whose evidence appears to the court to be essential to the just decision of the case. In any other application the court may summon and examine or may recall and re-examine any person.

[25] It is not possible to determine from the trial Judge's Ruling on what basis he concluded that the application did not qualify under section 116 of the Act. However it may be suggested that, by recounting the history of the proceedings, the trial Judge had taken into account the timing of the application. It is clear that the trial Judge has not referred to the test that is required to be considered of whether the evidence was essential to the just decision of the case.

[26] The issue then is whether the trial Judge's Ruling, which had the effect of depriving the Petitioner's counsel of the opportunity to cross-examine the complainant on her prior criminal history, resulted in a substantial and grave injustice to the Petitioner. The Court of Appeal concluded that there had not been a substantial miscarriage of justice and in reaching that conclusion had relied on the decision of the New Zealand Court of Appeal in **R v G** (supra).

[27] Before considering that decision it is first of all necessary to examine what has been referred to as the previous conviction of the complainant. It must be recalled that in March 2011 the complainant was still only 16 years old. The material before the trial judge in relation to the complainant's criminal history consisted of a document issued by the Criminal Records Office with the heading *"Previous Convictions."* It stated that on 11 June 2012 at the Ba Magistrates Court the complainant was before the court for the offence of receiving stolen property and was sentenced to be bound over in the sum of $200.00 to keep the peace and to be of good behaviour for the next 12 months. It would appear that the police file was opened in 2011 which would suggest that the offence occurred in 2011 or earlier when the complainant was 17 years old or younger. There are a number of issues that were not considered by the trial Judge but which should be considered in the context of this petition. The first matter is that in the sentence column of the document it does not state that the complainant was convicted. It may be that the

sentence was imposed on a finding of guilt without formally recording a conviction. This would be consistent with section 20 of the Juveniles Act 1973. Secondly it is not apparent whether the complainant had admitted the offence. Thirdly it is clear that at the time of the commission of the offence the complainant must have been under the age of 18 since she did not turn 18 until 15 May 2012. Finally, the document should have indicated that the complainant was sentenced by the Court as a juvenile.

[28] It appears not to be disputed that the offence of receiving stolen property was committed after the offence of rape and that the complainant was sentenced in the Ba Court prior to the petitioner's trial and conviction in the High Court.

[29] The facts in **R v G** (supra) are in many ways similar to the facts in the present case. In that case the complainant and the appellant knew each other. At the invitation of the complainant the appellant had come to stay with her. The complainant was 16 years old at the time. The appellant was 20 years old. The complainant later alleged that the appellant had sexually violated her. The appellant was convicted on three counts of rape. The credibility of the complainant and her reliability as a witness was the primary issue at the trial. The complainant had a record of prior offending for dishonesty and property based offending. The appellant's appeal was based on the ground that the prosecution had failed to disclose the particulars of the previous offending of the complainant to the defence.

[30] The Court of Appeal in **R v G** (supra) at page 11 noted that the common law duty of the prosecution to disclose to the defence convictions of prosecution witnesses relevant to credibility applied to convictions that *"a reasonable tribunal of fact could regard as tending to shake confidence in the reliability of the witness."*

[31] As in the present case the complainant had offending records that involved appearances in the Young Persons Court. The New Zealand Court of Appeal determined that there had been no miscarriage of justice on the basis that the prior offending for dishonesty offences, though "*bearing on general credibility*", had little bearing on the veracity of the

complainant's allegation of sexual violation. As in the present case the issue in **R v G** (supra) was whether the complainant was telling the truth in her account of sexual violation. I accept that a minor property based offence committed by the complainant when still very young after the alleged incident of rape is almost irrelevant when assessing the veracity of the evidence given by the complainant in relation to such a serious allegation.

[32] In my view the trial Judge should have considered whether the evidence was essential to the just decision of the case and in doing so should have applied the test set out in **R v G**. However, I have concluded for the reasons stated, that there has been no miscarriage of justice as a result of the trial Judge's decision to refuse the petitioner's application. I would refuse leave to the petitioner to appeal the decision of the Court of Appeal on grounds one and two of the petitioner's application for leave to appeal.

[33] The third ground relied upon by the petitioner is that the prosecution's failure to disclose the complainant's criminal history in a timely manner deprived him of the right to cross-examine the complainant on that matter and that as a result he had not received a fair trial.

[34] There is a duty on the part of the prosecution to disclose to the defence any conviction of a prosecution witness that is relevant to credibility. That duty extends to a finding of guilt as a juvenile. In this case it may be said that, between the finding of guilt in the Ba Court on 11 June 2012 and the start of the trial on 11 March 2013, there was sufficient time for the prosecution to have searched for and provided the information to the defence. That the prosecution was not aware of the complainant's court appearance and finding of guilt is not a matter that should determine the issue. That fact is more concerned with systems and processes within the prosecution branch of the criminal justice system.

[35] However for the same reasons upon which I based my conclusion in relations to grounds one and two, I have concluded that even if the prosecution had disclosed the complainant's criminal history to the defence thereby enabling the complainant to be

cross-examined it would have been open to the trial judge to find that the veracity of the complainant's evidence and her reliability as a witness had not been diminished or shaken. It follows that the petitioner has not been denied a fair trial. As a result I would refuse leave to the petitioner to appeal the decision of the Court of Appeal on ground three.

[36] In conclusion, I would refuse leave to appeal.

Order:

Application for leave to appeal is refused.

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Hon Justice Anthony Gates
President of the Supreme Court

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Hon Justice B. Keith
Judge of the Supreme Court

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Hon Justice W.D Calanchini
Judge of the Supreme Court